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In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 224

GEORGE J. RHODES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 4a–10a) is not yet reported.

JURISDICTION

The order of the United States Court of Claims dismissing the petition was entered on January 12, 1962. A petition for rehearing, timely filed, was denied on April 4, 1962. The petition for writ of certiorari was filed on July 3, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether removal of petitioner from his position as a document analyst in the Central Intelligence

Agency was in compliance with applicable statutory procedures and regulations.

STATUTE AND REGULATIONS INVOLVED

Section 102(c) of the National Security Act of 1947, 61 Stat. 498, 50 U.S.C. 403(c), provides as follows:

> (c) Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

CIA Regulation 20–705, dated 30 January 1959, provides in relevant part as follows:

> 1. GENERAL
>
> a. This regulation states the requirements and procedures applicable to certain separation actions. This regulation governs the separation of Agency employees for all reasons except reduction in force, entry into military service, separation based on adverse findings of a security hearing board, and termination by the Director under the authority granted him by section 102(c) of the National Security Act of 1947 (61 Stat. 495, 50 U.S.C. 401, P.L. 253, 80th

Congress, first session), as amended, and as set forth in Regulation No. 20–740.

* * * * *

CIA Regulation 20–740, dated 1 November 1954, provides:

1. Statutory Powers of the Director of Central Intelligence

The Director of Central Intelligence is empowered to terminate the employment of any officer or employee of the Agency whenever he deems such action necessary or advisable in the interests of the United States. Termination action under this authority, quoted below, in within the sole discretion of the Director of Central Intelligence, and no appeals procedure is provided for by law.

"Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

2. Employment Review Board

The Director may appoint an Employment Review Board to advise him concerning any particular case.

STATEMENT

Petitioner was employed by the Central Intelligence Agency as a document analyst (R. 2, 19). The position is an extremely sensitive one. Even its description is classified (R. 34, 47).

On November 21, 1958, petitioner was orally advised that the termination of his employment was being considered (R. 2, 8, 55). Subsequently, on January 6, 1959, he received a memorandum from the Agency's personnel officer. It notified petitioner of the provisions of section 102(c) of the National Security Act of 1947, *supra*, p. 2, and indicated their applicability to his proposed termination. Reference was also made, by name, to CIA Regulation 20–740, *supra*, p. 3 (R. 12–13).

On February 10, 1959, the Director of Central Intelligence made the determination that it was advisable in the interests of the United States to terminate petitioner's employment with the C.I.A. under section 102(c) of the National Security Act (R. 49). Petitioner was advised of this decision by memorandum dated February 13, 1959 (R. 18, 50). On March 16, 1959, his employment was terminated (R. 19).

Petitioner then sought to appeal the termination of his employment to the Civil Service Commission. The Appeals Examining Office of the Commission noted: (1) that petitioner was separated from his position with the C.I.A. pursuant to section 102(c) of the National Security Act; (2) that the Commission has held that the provisions of section 14 of the Veterans Preference Act are not applicable to removal of preference eligible employees effectuated

under the authority of section 102(c); and (3) that employees so removed have no right to appeal to the Commission. The Office stated further that petitioner's allegation that the C.I.A. had failed to follow its own regulations was not within the jurisdiction of the Civil Service Commission. This contention was referred to the C.I.A. for whatever action it might deem appropriate (R. 20-21).

Petitioner then appealed the decision of the Appeals Examining Office to the Civil Service Commission's Board of Appeals and Review. After giving the case full consideration, the Board affirmed the conclusions of the Appeals Examining Office in all respects (R. 22–23).

Shortly thereafter, the C.I.A.'s General Counsel responded to the averments that the agency had not followed its own regulations in terminating petitioner's employment. He stated that the only administrative regulation applicable to termination of employment under section 102(c) was CIA Regulation 20–740 (R. 24–25). Since that regulation has no procedural requirements, the agency could find no basis for the allegation that it had failed to follow its own regulations (R. 26).

The Court of Claims held that petitioner's employment was terminated pursuant to section 102(c) of the National Security Act and CIA Regulation 20–740 (R. 75, Pet. App. 8a). It found that the agency violated no regulation in effecting such termination, and consequently that the action of the Civil Service Commission in refusing to entertain

that issue could not be deemed arbitrary, capricious, or contrary to law (R. 77, Pet. App. 10a).

ARGUMENT

The decision of the court below is clearly correct and there is no conflict with any other decision. Moreover, the petition presents no question of general importance. Further review is, therefore, not warranted.

1. Section 102(c) of the National Security Act of 1947, *supra*, p. 2, provides that, "[n]otwithstanding the provisions * * * of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States * * *." As noted in CIA Regulation 20–740, issued in 1954, *supra*, p. 3, "[t]ermination action under this authority * * * is within the sole discretion of the Director of Central Intelligence, and no appeals procedure is provided for by law."

Petitioner does not question the import of section 102(c). Nor does he endeavor to challenge the validity of the section as construed in the above regulation. Rather, his claim that the termination of his employment was improper rests on the premise that the agency's action was initiated under CIA Regulation 20–705, *supra*, pp. 2–3, which establishes procedures for certain types of separations, but *not* including those resulting from the exercise of the Director's authority under section 102(c). On this premise, and relying principally on *Service* v. *Dulles*, 354 U.S. 363, petitioner asserts that he was entitled to the bene-

fit of that Regulation, section 14 of the Veterans Preference Act, 5 U.S.C. 863, and Regulation 21.10 of the Civil Service Commission, 5 C.F.R. 21.10.

a. The record refutes petitioner's claim as to the basis on which his termination was initiated. It was neither alleged nor shown that Regulation 20–705, or any regulation other than 20–740, was ever mentioned to petitioner. Furthermore, contrary to petitioner's contention advanced below and again in this Court (Pet. 3), the memorandum of the agency's Personnel Officer, dated January 6, 1959, fully notified petitioner of the pertinent terms of the Nation Security Act, and the applicability of Regulation 20–740:

* * * * *

> 4. * * * However, if I agree with the action of the Career Board which refers the case to me and find further that the individual concerned is not suitable for employment elsewhere in the Agency, I must recommend that his termination is advisable in the national interest. Such recommendation must go to the Director of Central Intelligence as he is given the discretionary authority in the National Security Act of 1947 to terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States. This authority is given notwithstanding the provisions of any other law and requires no specific procedures or regulations. * * *
>
> 5. The only regulation specifically concerned in a case of this sort is CIA Regulation 20–740, which merely sets forth the Director's statutory authority. Aside from this regulation,

there is no Agency regulation to furnish you an [*sic*] answer to your request, but I believe the foregoing should furnish you adequate information for the full understanding of your situation.

* * * * *

At the time petitioner was first informed that his dismissal was being considered, the Personnel Officer offered him a hearing. Conceivably, this misled petitioner as to the applicable regulation. But the memorandum of January 6, 1959, given petitioner over ten weeks prior to his final termination, certainly clarified this point:

* * * * *

3. As a normal personnel function, it is my duty to review the case and make an appropriate recommendation in light of the Agency's needs. In carrying this out, I believe it is necessary and appropriate not only to review the action of the Career Board and the basis therefor, but also to provide a hearing for the employee concerned to make sure in the first place that he thoroughly understands the situation and, secondly, has an opportunity to present his side of the story. *This is not a matter of regulation* but what I deem fair and proper treatment of the case. * * * [Emphasis added.]

* * * * *

b. Even if petitioner's dismissal had been initiated under Regulation 20–705, his reliance on *Service* v. *Dulles, supra,* would have been misplaced. The rule laid down in that case merely requires an agency or department effecting a dismissal under particular statutory authority to follow all of its regulations

pertinent to such a dismissal. Stated otherwise, it must first be determined under what authority the employee was discharged, and then ascertained whether the requirements of the administrative regulations (if any) applicable to terminations under that authority have been observed.

Petitioner does not dispute that, as he was expressly advised, his termination was effected by the Director of Central Intelligence under section 102(c) of the National Security Act and CIA Regulation 20–740. In these circumstances, Regulation 20–705 was, in terms, inapplicable. Again, that regulation specifically states that it does not apply to "termination by the Director under the authority granted him by section 102(c) of the National Security Act of 1947 * * * and as set forth in Regulation No. 20–740."

2. Since CIA Regulation 20-705 was not applicable, there is no substance to petitioner's contention that the agency's failure to supply him with a copy of it was prejudicial. Similarly, the agency's refusal to permit petitioner representation by counsel at the hearing offered by the Personnel Officer was not a denial of any of his rights. The only applicable regulation is 20–740, and it does not subject the Director's exercise of discretion to any procedural requirements.

3. Petitioner also challenges the refusal of the Civil Service Commission to entertain the question of whether the C.I.A. failed to observe its own regulations in effectuating his dismissal. While petitioner presumably relies on section 14 of the Veterans Pref-

erence Act, the Commission correctly concluded that this section has no application to dismissals under section 102(c) of the National Security Act. In explicitly excepting the exercise of the Director's discretionary authority from the force of "the provisions of any other law", Congress rendered inoperative, as to section 102(c) terminations, the appeal procedures provided by section 14 of the Veterans Preference Act, no less than its other provisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.